No. 11,142

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel,

Appellants,

vs.

United States of America,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

Francis T. Cornish,
American Trust Building, Berkeley 4, California,
Attorney for Appellants and Petitioners.

Pernau-Walsh Printing Co., San Francisco

Subject Index

	Page
Analysis of the opinion	2
Argument	7
Conclusion	11

Table of Authorities Cited

Cases

	Pages
Black v. Elkhorn Mining Co., 49 Fed. 549	10
Empie v. United States, 131 F. (2d) 481	7

Statutes

Declaration of Taking Act of February 28, 1931, 46 Stat. 1421, C. 307, 40 U.S.C.A., Section 258(a) 9

United States Code:

Title 33, Section 594 ..... 8, 9, 10

Title 33, Sections 591 et seq. 7

No. 11,142

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel,

Appellants,

vs.

United States of America,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Judges thereof:

The appellants F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel hereby petition this Honorable Court and the Honorable Judges pursuant to Rule 25 of the rules of this Honorable Court to grant to these petitioning appellants a rehearing of the cause after decision by the Honorable Garrecht, Denman and Orr, Circuit Judges, which decision was filed herein on May 9th, 1946.

These petitioning appellants request a rehearing because they urge that the Court should not have applied the same rule of vesting of title in the United States of America of the profit *á prendre* taken in this

case that is applied to the taking of title to corporeal property.

In so requesting a rehearing they respectfully point out to the Court that its opinion takes for granted that the United States of America took and condemned a two year profit *á prendre,* as distinguished from the two year profit *á prendre* starting on a given date, which right, of necessity, being intangible, had to vest and could not be abandoned.

ANALYSIS OF THE OPINION.

In an effort more clearly to point out the precise question we take the liberty to here set forth the portions of the opinion which leave these petitioning appellants with the sincere conviction that in rendering its opinion this Honorable Court failed to consider the fact that by the terms of the complaint and the order for immediate possession the profit *á prendre* was to commence on a specified day, to run for a specific two year period after that date, as distinguished from an abstract two year privilege. In its opinion, nowhere does the Court even refer to the specific date which was to start the privilege nor the specific date the privilege was to end.

The Court failed to pass on several assignments of error, stating

> "Since we hold that the profit *a prendre* was not taken the remaining assignments concerning damages are not considered".
>
> (Opinion of the Court, p. 1.)

After setting forth the statutes under which condemnation proceedings were filed, the Court continues

> "Under these sections condemnation of the title to the profit *a prendre* succeeds the purchase and payment for the title after the determination of its value in the condemnation proceedings".
>
> (Opinion of the Court, p. 2.)

The opinion continues:

> "The appellee did not here seek an immediate taking of the title to the profit *a prendre* under the Declaration of Taking Act * * * nor did the district court order such a taking of that title. It did not have the power to do so prior to the payment of a determined compensation. * * *"
>
> (Opinion of the Court, p. 2.)

Follows a holding that under the rule of the authorities cited, the United States of America had the right to abandon.

> "Appellants concede that had the appellee sought to condemn the title to the gravel itself the above cases would apply. It contends that a different rule applies to taking the title to the profit *a prendre*, which in California is an interest in realty and not an easement, that is, title to the right to take the gravel. Appellants' argument is based upon an asserted interpretation of the language of the Act under which the condemnation is sought * * *
>
> As seen, a profit *a prendre* is not an easement. This argument seems to be that possession of the land by one seeking such an interest in it as a profit *a prendre* vests the title while the possession of the land by one seeking the fee thereto does

not vest it. They would have the future words 'interest to be acquired' construed to mean 'interest acquired at the moment of possession', an obvious negation of the intent of the Congress.

We are unable to see any distinction between the taking the title to corporeal property and to seek an interest in realty as the profit *a prendre*. Payment must precede the taking of title and abandonment may precede the determination of the amount to be paid for the title."

(Opinion of the Court, pp. 3-4.)

This Honorable Court, by its opinion and decision has ruled there is no difference in vesting of a corporeal right taken and an incorporeal right taken. With this ruling no student of the law could justly quarrel. In fact, appellants themselves concede that the opinion and decision is to that extent good law.

Petition is made for a rehearing because the profit *á prendre* condemned by the United States of America was not just a two year profit *á prendre:* it was a profit *á prendre* for two years, TO COMMENCE ON THE DATE THE COURT MADE ITS ORDER PUTTING THE GOVERNMENT INTO POSSESSION, and to end two years after the making of that order.

Appellants do not contend, and never did contend, that title to the profit *á prendre* vested because the United States of America took possession of their land: instead they contend that by the express wording of the statute under which the condemnation was made, which language is set forth in the opinion of this Honorable Court

> "The United States, upon the filing of the petition in any such proceeding, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest *to be* acquired, and proceed with such public works thereon as have been authorized by Congress".
>
> (Opinion of the Court, p. 3.)

the profit *á prendre* vested because the Court made the order, which, by the very language of the complaint defining the commencement and termination of the profit *á prendre,* was to start its two year period of its duration in being.

In its opinion, this Honorable Court does not discuss the exact date of commencement of this profit *á prendre* as distinguishing it from a general two year profit *á prendre,* the exact date of commencement and termination of which are not fixed. Nor does this Honorable Court, in its opinion specifically state that this is but a distinction without a difference.

It is with no little embarrassment and shame that appellants file this petition for a rehearing. This feeling is brought about through the inability of counsel for appellants to express himself, either in his briefs or in his oral argument, with sufficient clarity to explain that this appeal would not have been taken, nor would the case have ever been tried in the District Court, had the profit *á prendre,* by the terms of the complaint, not been defined as being

> "for a period of two years *from and after the granting and entry of an order by the Court,*

granting to the United States of America immediate possession of said land, * * *." (Italics for emphasis.)

(T. R. p. 6.)

Appellants have always conceded that the United States of America could abandon the profit *á prendre* if it had never started to run. Appellants have always conceded that mere possession of the land was of no value. Appellants have always conceded that their mining profits lost or deferred through possession by the United States of America are not recoverable damages in a condemnation action. But appellants have always insisted, not because the United States of America took possession, but because the District Court made an order granting to the United States of America the right to take possession, the profit *á prendre* started to run; that because the statute gave the United States of America *the right* to enjoy the profit *á prendre* at once it had to vest; that because it vested, its incorporeal nature made it impossible to abandon or give back the expired portion of the intangible privilege; that because the expired portion of the intangible privilege could not be abandoned, payment for that must be made.

With the permission of this Honorable Court, appellants will therefore attempt to clarify their argument on this phase of the case by a restatement.

ARGUMENT.

The right in appellants' land which appellee sought by condemnation was

> "A right of uninterrupted use and occupancy of the land hereinafter described *for a period of two years from and after the granting and entry of an order by this Court granting to the United States of America immediate possession of said land,* for the purpose of, during said period of two years, removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir." (Italics for emphasis.) (T. R. pp. 6-7.)

The complaint sets forth that the condemnation was pursuant to U. S. Code, Title 33, Sections 591 et seq. It is true that such proceedings must be in conformity with the California law, and that ordinarily the title to the rights condemned does not vest, under California law, until the condemnation price is paid.

Empie v. United States, 131 F. (2d) 481.

It is also true that this proceeding being under federal statute, the federal statute is controlling, taking precedence over the state law and procedure in so far as the two are repugnant. The federal statute in this case is repugnant to the state practice. It provides

"When Immediate Possession of Land May be Taken. Whenever the Secretary of War, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or right of way needed for a work of river and harbor improvements duly authorized by Congress, *the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: Provided, That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted.* The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid. (July 18, 1918, § 5, 40 Stat. 911.)" (Italics for emphasis.)

U. S. Code, Title 33, § 594.

In order to entitle the United States of America to an order for immediate possession, and in order to entitle the United States of America to remove

gravel at once and use it in the dam, even although compensation had neither been fixed nor paid, the complaint was so drawn as to set forth

> "That adequate funds are available for paying any and all awards that may be granted herein to any of said above named defendants or to anyone having any interest in and to said land, from an appropriation for maintenance and improvements of existing works for Rivers and Harbors, Act approved July 19, 1937." (T. R. p. 12.)

This statute (U. S. Code, Title 33, § 594) and the charging allegations in the complaint are not unlike the Declaration of Taking Act of February 28, 1931, 46 Stat. 1421, C. 307, 40 U.S.C.A., Section 258(a) and the charging allegations necessary to plead under that latter statute. It is generally held that title vests when taken under this latter act. There would be no denial of due process of law were title to vest,

> "Provided, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the Court in which such proceedings shall be instituted."
>
> *U. S. Code,* Title 33, Section 594.

The right to take gravel, a profit *á prendre,* was to run, not for two years, but for a specific period

> "of two years *from and after the time of the granting and entry of an order by this court, granting to the United States of America immedi-*

> *ate possession of said land* * * *. (Italics for emphasis.) (T. R. p. 11.)

The statute authorizing both the entry into possession and the order "granting to the United States of America immediate possession" of the land sought, provides, as set forth by this Honorable Court in its opinion

> "* * * the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, *to the extent of the interest to be acquired,* and proceed with such public works thereon as have been authorized by Congress * * *." (Italics for emphasis.)
>
> (Opinion of the Court, p. 3.)

"Profit *á prendre*" is defined to be the right of taking soil, gravel, minerals, and the like from the land of another.

> *Black v. Elkhorn Mining Co.,* 49 Fed. 549, 551.

There is nothing tangible or corporeal about a profit *á prendre*. It is a mere *right to take* from the land of another. It was this intangible right which appellee sought, as distinguished from the tangible, corporeal gravel itself. U. S. Code, Title 33, Section 594 gave the appellee the right to proceed to enjoy that incorporeal privilege, even before compensation was either determined or paid. Appellants submit what more could possibly be done to vest a privilege to take from the land of another than the right to enjoy that privilege at once, right now, before compensation is either determined or paid, to the fullest extent sought?

CONCLUSION.

Appellants therefore respectfully petition this Honorable Court to grant a rehearing, to reconsider the application to the instant case of the rules laid down in the opinion and decision, and, after such reconsideration, to rule: that because the profit *á prendre* commenced on a day certain, and was to end on a day certain, notwithstanding compensation had been neither determined nor paid, and during its first 23 months the statute bestowed upon appellee the right of full enjoyment of the profit *á prendre* as condemned, the rights vested, cannot be abandoned, and compensation therefor must be paid.

Dated, Berkeley, California,
June 5, 1946.

Respectfully submitted,
FRANCIS T. CORNISH,
Attorney for Appellants and Petitioners.

Certificate Under Rule 25.

Francis T. Cornish, attorney for petitioners, the appellants, F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel hereby certifies that the foregoing petition for a rehearing is in his opinion and judgment well founded, and that said petition has not been interposed for delay.

Dated, Berkeley, California,
June 5, 1946.

Francis T. Cornish,
Attorney for Appellants and Petitioners.

Due service and receipt of a copy of the within is hereby admitted

this.....day of June, 1946.

.....

.....

Attorneys for Appellee.